

NO. 83-1389

IN THE

SUPREME COURT OF THE UNITED STATES

---

THE STATE OF TEXAS, Petitioner

VS.

SERLEE BENSON, Respondent

---

RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

---

DUNNAM, DUNNAM, HORNER & MEYER

By: W. V. Dunnam, Jr.  
State Bar No. 06262000

4125 West Waco Drive - P. O. Box 8418  
Waco, Texas 76714 (817) 753-6437

ATTORNEYS FOR RESPONDENT

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I.

REASONS FOR DENYING WRIT

Retrial of the Defendant was precluded because the Texas Court of Criminal Appeals held that the evidence was insufficient to support a finding of guilt upon the only theory submitted to the jury. Petitioner's statement that the question presented is whether reversal for trial error precludes a retrial is simply untrue.

II.

STATEMENT, ARGUMENT AND AUTHORITIES

The State's contention is that a Defendant may be retried if there was evidence to support a finding of guilt under a theory that was abandoned and not submitted to the jury, though the evidence was insufficient to support a finding of guilt upon the only theory actually submitted to the jury. The exact converse is true. In deciding an issue on sufficiency of the evidence, the true question is whether the evidence is sufficient to support the finding of the jury as to the issue or issues submitted in the Court's Charge.

The State contends that there was a mere error in the Court's Charge instead of insufficient evidence to support the verdict. Actually, there was no error in the Court's Charge. It correctly stated the law in plain English that was subject only to one meaning and the evidence was insufficient to prove the facts required to be found for a guilty verdict. A trial error in the Charge within the meaning of Burks vs. U.S. 4 U.S.1 means an incorrect statement of law either by misstatement or omission. Any time in any case, if the evidence is insufficient to support a guilty finding, under the State's theory, you could state that such was a mere error in the Charge because the Court charged on issues not raised by the evidence. Such is obviously fallacious reasoning and amounts to putting the cart before the horse.

Let us assume the following hypothet: A Defendant is indicted for rape by force, threats, and fraud. The alleged victim only testified that the Defendant caused her to submit by threatening to break all the bones in her nose with his fist. An accomplice witness testified that the Defendant also twisted the victim's arm forcing her to submit. The Court charges solely on rape by force. The jury acquits the Defendant. Would the State contend that it could thereafter retry the Defendant for rape by threats? The answer is no, and the same law of Jeopardy under the Burks decision, supra., would prevent such retrial if the Defendant had been found guilty and the evidence held to be insufficient to support a verdict of guilt as to rape by force. When the Court's Charge limits the



finding of guilty to one of several means alleged in the indictment, such amounts to a forced election by the State, Wells vs. State 105 S.W. 820, Williams vs. State 105 S.W. 1024. It also may be deemed tantamount to and have the same effect as an instructed verdict or judgment of acquittal by the Trial Court as to all theories not submitted in the Charge, Wood vs. State 317 S.W.2d 940. In such instance it is patent that any retrial is barred by Federal and State constitutional Jeopardy provisions. Ex Parte Scelles 461 S.W.2d 300 is precisely in point.

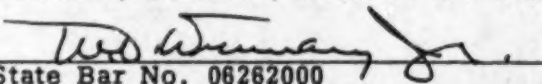
III.

CONCLUSION AND PRAYER

The Judgment of the Court of Criminal Appeals is correct and Writ of Certiorari should be denied, and it is accordingly so prayed.

Respectfully submitted:

W. V. Dunnam, Jr.  
DUNNAM, DUNNAM, HORNER & MEYER

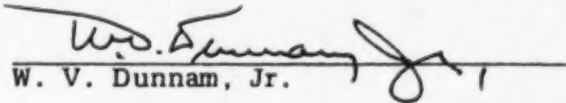
  
State Bar No. 06262000

4125 West Waco Drive - P. O. Box 8418  
Waco, Texas 76714 (817) 753-6437

ATTORNEYS FOR SERLEE BENSON

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Response has been duly mailed to counsel for Petitioner, Mr. James O. Kopp, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, this 1st day of May, A.D. 1984.

  
W. V. Dunnam, Jr.

**ORIGINAL**

NO. 83-1389

IN THE  
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.  
**FILED**

**MAY 4 1984**

ALEXANDER L. STEVAS  
CLERK

THE STATE OF TEXAS, Petitioner

VS.

SERLEE BENSON, Respondent

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SUPREME COURT, U.S.

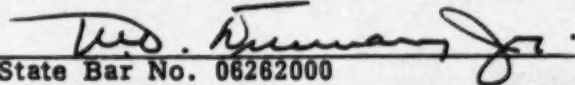
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Serlee Benson, Respondent, moves this Honorable Court for leave to proceed in forma pauperis herein and to permit the filing of a typewritten response to the Petition for Certiorari filed herein by the State of Texas in the above cause.

Respectfully submitted:

W. V. Dunnam, Jr.  
DUNNAM, DUNNAM, HORNER & MEYER

  
State Bar No. 06262000

4125 West Waco Drive - P. O. Box 8418  
Waco, Texas 76714 (817) 753-6437

ATTORNEYS FOR SERLEE BENSON

Affidavit:

I, Serlee Benson, Respondent, being duly sworn depose and say:

That I am the Respondent in the above and entitled cause and in the Reply to the State's Petition for Certiorari filed herein and because



of my poverty I am unable to pay the fees and costs of this proceeding or the costs of the printing of my Reply to said Petition for Certiorari or give security therefor; I believe I am entitled to the redress sought and am making this Affidavit in good faith.

Serlee Benson  
Serlee Benson, Respondent

SWORN TO AND SUBSCRIBED before me by Serlee Benson this 27th day of April, A.D. 1984.

Cindy J. Schofield  
Cindy J. Schofield - Notary Public in  
McLennan County, Texas  
Comm. Exp.: January 20, 1985

Certificate of Service:

A true copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and the Affidavit attached thereto have been duly mailed to Mr. Charles A. Palmer, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, attorney of record for the Petitioner herien, this 1st day of May, A.D. 1984.

W. V. Dunnam, Jr.  
W. V. Dunnam, Jr.  
Attorney for Serlee Benson